Paper No. 18
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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Microcal, Inc.

Serial No. 75/075,318

Donna M. Weinstein of Fish & Richardson P.C. for Microcal, Inc.

Cheryl L. Steplight, Trademark Examining Attorney, Law Office 103 (Michael A. Szoke, Managing Attorney).

Before Cissel, Chapman and Bottorff, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

Microcal, Inc. has filed an application to register on the Principal Register the mark MICROCAL for "scientific instruments, namely, calorimeters; computer software

programs for the collection, analysis, and presentation of scientific data, and user manuals sold as a unit."[1]

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its goods, so resembles the registered mark MICROCAL for "laboratory measuring equipment, namely multifunction processor and calibrator for use in measuring and simulating temperature signals, thermocouples, platinum thermometers, resistance measurements, milliampres and millivolts,"[2] as to be likely to cause confusion, mistake or deception.

When the refusal was made final, applicant appealed.[3] Both applicant and the Examining Attorney filed a brief. Applicant did not request an oral hearing.

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[1] Application Serial No. 75/075,318, filed March 20, 1996. The application was filed based on a claimed date of first use and first use in commerce (for calorimeters) of April 4, 1978.

[2] Reg. No. 1,454,932, issued September 1, 1987, Section 8 affidavit accepted, Section 15 affidavit acknowledged. The claimed dates of first use and first use in commerce are October 23, 1983.

[3] Subsequent to applicant's filing of its brief, the newly-assigned Examining Attorney requested a remand under Trademark Rule 2.142(d) in order to place additional evidence in the record. The Board granted the request; and the Examining Attorney issued a further Office action on July 28, 1998. The Board resumed the appeal, and allowed applicant time to submit a supplemental brief and rebuttal evidence to that submitted by the Examining Attorney. Applicant did not file anything in response. The Examining Attorney filed her brief, and applicant did not file a reply brief.

We affirm the refusal to register. In reaching our decision we have considered all of the relevant du Pont[4] factors.

The involved marks are identical. "The greater the similarity in the marks, the lesser the similarity required in the goods or services of the parties to support a finding of likelihood of confusion." 3 J. McCarthy, McCarthy on Trademarks and Unfair Competition, §23:20.1 (4th ed. 1999). See also, In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993).

We turn to a consideration of the cited registrant's goods and applicant's goods. Applicant's position is that the goods are not closely related as "Registrant's MICROCAL goods deal with the measurement of temperature, whereas Applicant's MICROCAL calorimeters measure heat, not temperature" (brief, p. 1); and that registrant's mark is highly suggestive of its goods and therefore is entitled to a narrow scope of protection, as evidenced by two third-party registrations for the mark MICROCAL in Class 9.[5]

Applicant submitted (i) the Merriam-Webster's Collegiate Dictionary (10th ed.) definition of "micro" as

[4] See In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

[5] Applicant did not properly make the two third-party registrations of record. Rather, applicant merely listed the two

"1. very small; esp.: microscopic 2. involving minute quantities or variations"; and (ii) the Van Nostrand's Scientific Encyclopedia (8th ed.) definition of "calorimetry" which opens with "The study of heat as contrasted with temperature...."

The Examining Attorney argues that the parties' goods are clearly related inasmuch as registrant's goods include processors and calibrators which measure temperature, and one of the items listed in applicant's identification of goods is calorimeters, which measure heat; that both of these are scientific instruments which can be used together by the same consumers in a laboratory; that even if the purchasers and users of these goods are scientists, technically sophisticated purchasers are not immune from source confusion; and that the channels of trade are not restricted in either the application or the cited registration.

In support of this position, the Examining Attorney submitted (i) the McGraw-Hill Concise Encyclopedia of Science & Technology (2nd ed.) definition of "heat" which reads, in part, as follows: "heat is that form of energy in transit due to a temperature difference between the

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registrations in the body of papers filed in this case. See In re Smith and Mehaffey, 31 USPQ2d 1531, footnote 3 (TTAB 1994).

source from which the energy is coming and the sink toward which the energy is going."; (ii) copies of several third-party registrations, which issued on the basis of use in commerce, to show that a single entity has adopted a single mark for both calorimeters and thermometers; (iii) copies of numerous excerpted stories from the Nexis database to demonstrate the close connection between calorimeters and temperature measurements; and (iv) copies of pages from applicant's website wherein applicant extensively discusses temperature in relation to calorimetry.

It is well settled that goods need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of the goods or services. See In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991), and In re International Telephone & Telegraph Corp., 197 USPQ 910 (TTAB 1978).

The record before us establishes that the respective goods of the parties are related. Specifically, registrant's products are "laboratory measuring equipment, namely, multifunction processor and calibrator for use in measuring and simulating temperature signals, thermocouples, platinum thermometers, resistance measurements, milliampres and millivolts" measures (at least in part) temperature; whereas one of applicant's listed items is "scientific instruments, namely, calorimeters" which measure heat.

The fact that applicant has shown the scientific definition of calorimetry [Van Nostrand's Scientific Encyclopedia (8th ed.)] to be the study of heat (not temperature), does not persuade us that these goods are unrelated for purposes of our analysis of whether confusion is likely. In any event, we note that the same dictionary definition of "heat" includes the following statement:

> To determine the heat of combustion of a fuel, a representative sample is burned in a high-pressure oxygen atmosphere within a metal bomb or pressure vessel. *The energy released by this combustion is absorbed within the calorimeter and measured in terms of temperature change within the calorimeter.* The heat of combustion of the sample is obtained by multiplying the temperature rise of the calorimeter by a previously determined energy

> equivalent or heat capacity for the instrument. (Emphasis added.)

In addition, applicant's website includes the following representative statements:

> Differential Scanning Calorimetry (DSC) is an instrumental method used to measure conformational energy in macromolecules. This is accomplished by 'scanning up' in temperature and measuring the difference in heat generated in a sample and reference cell.;
>
> ...the superb stability of the VP-DSC permits constant temperature use over extended time periods thus opening new uses and applications using the system in its isothermal mode.; and
>
> During a DSC experiment, a sample is heated over a range of temperature....

Moreover, while third-party registrations are not evidence of commercial use of the marks shown therein, or that the public is familiar with them, the third-party registrations submitted by the Examining Attorney which individually cover a number of different items and which are based on use in commerce, have some probative value to the extent they suggest that the listed goods emanate from a single source. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785 (TTAB 1993); and In re Mucky Duck Mustard Co., Inc., 6 USPQ2d 1467, footnote 6 (TTAB 1988).

While the involved goods clearly are not identical, the record shows that both applicant's calorimeters and registrant's calibrators and thermometers are related scientific/laboratory equipment (the former used to measure heat by changing the temperature and the latter used to measure temperature).

Applicant has included no restriction to trade channels or purchasers in its identification of goods. Thus, the Board must consider that the parties' respective goods could be offered and sold to the same classes of purchasers through all normal channels of trade. See In re Smith and Mehaffey, 31 USPQ2d 1531 (TTAB 1994); and In re Elbaum, 211 USPQ 639 (TTAB 1981).

Even assuming that the purchasers and users of the goods in question in the instant case are technically sophisticated, and may readily understand any differences between the functions of these different devices, this does not mean that such purchasers and users are immune from confusion as to the origin of the respective goods, especially when sold under the identical mark. See Weiss Associates Inc. v. HRL Associates Inc., 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990); Aries Systems Corp. v. World Book Inc., 23 USPQ2d 1742, footnote 17 (TTAB 1992); In re Pellerin Milnor Corporation, 221 USPQ 558 (TTAB 1984); and

Aerojet-General Corporation v. American Standard, Inc., 171 USPQ 439 (TTAB 1971).

Based on the relatedness of registrant's goods with one of the items listed in applicant's identification of goods,[6] and the similarity of the trade channels and purchasers, we find that there is a likelihood that the purchasing public would be confused when applicant uses the identical mark for scientific instruments, namely, calorimeters.

Decision: The refusal to register under Section 2(d) is affirmed.

R. F. Cissel

B. A. Chapman

C. M. Bottorff
Administrative Trademark
Judges, Trademark Trial and
Appeal Board

[6] Likelihood of confusion must be found if the purchasing public, aware of the registrant's mark for its goods, and seeing the mark on *any item* that is in the applicant's identification of goods, is likely to believe that registrant is the source of such item. See Tuxedo Monopoly, Inc. v. General Mills Fun Group, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).